

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

UNITED STATES OF AMERICA	*
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V	*
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BRIAN FOLKS	* CRIMINAL FILE NO. 16-94

CHAMBERS CONFERENCE

JURY TRIAL
Monday, April 22, 2019
Burlington, Vermont

BEFORE:

THE HONORABLE WILLIAM K. SESSIONS III
Senior District Judge

APPEARANCES:

WILLIAM B. DARROW, ESQ., EMILY M. SAVNER, ESQ. and
MATTHEW T. GRADY, ESQ., Assistant United States
Attorneys, Federal Building, Burlington,
Vermont; Attorneys for the United States

MARK J. KAPLAN, ESQ., Kaplan & Kaplan, Park Plaza,
Suite 405, 95 St. Paul Street, Burlington,
Vermont; Attorney for the Defendant

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Attorney; Attorney for the Defendant

ANNE NICHOLS PIERCE
United States District Court Reporter (retd.)
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1 MONDAY, APRIL 22, 2019

2 (The following was held in chambers at 10:00 a.m.)

3 THE COURT: This is United States versus
4 Folks. This is a conference with counsel. The
5 defendant is not present.

6 We are not going over any substantive issues. We
7 are actually going over procedural questions. It seems
8 to me there have been a number of questions that I have,
9 and then I will open it up for whatever questions you
10 have as well.

11 So first of all, the voir dire: What I was
12 thinking is that it is very likely that many people will
13 just say they cannot serve on a case like this, and so I
14 was thinking that if I began to ask my questions, which
15 I -- are standard, and get a number of responses, then I
16 will explore with them potential challenges for cause.

17 And then rather than turn to the lawyers and have
18 you go through your voir dire with probably half the
19 panel or maybe even more of people who are going to be
20 challenged for cause, why not just call you up, go
21 through the challenges for cause, replace them with
22 other jurors, and then ultimately move on until you have
23 30 people who are at least, according to the first round
24 of questioning, not subject to challenges for cause. I
25 thought that was faster.

1 Anyway, it's a little complicated because how you
2 move one juror -- I mean, you have to sort of re-seat
3 everybody, and it becomes a little bit complicated, but
4 it seems to me that's much faster so that ultimately
5 when you start asking questions, you have got a panel of
6 30 in front of you who reasonably could be qualified.

7 MR. KAPLAN: So you will focus on questions
8 about the case -- I mean the nature of the case and the
9 videos and the pictures and things?

10 THE COURT: So we go through that five-minute
11 statement from the lawyers. So that would still be
12 presented. So right after I introduce the case, then I
13 turn to the government and ask the government to make a
14 five-minute statement about the nature of the case, and,
15 in particular, you know, I think it should be disclosed
16 what they're likely to see or hear during the course of
17 the trial, and then you have five minutes or Natasha has
18 five minutes to actually also make your statement.

19 And then once you have done that statement, then I
20 will turn to the panel and say is there any reason why
21 any of you feel that you cannot serve on this particular
22 jury?

23 And my guess is there will be a few hands. And
24 then I would go through the very standard questions,
25 including presumption of innocence, standard of beyond a

1 reasonable doubt, defendant not testifying, et cetera.
2 And usually there's some responses of jurors to those
3 questions: Can they in this particular case presume Mr.
4 Folks to be innocent? Can they apply the standard of
5 proof beyond a reasonable doubt?

6 So I would go through all of those just to make
7 sure we have weeded out exactly those jurors who really
8 could never sit, and then replace them with the next
9 round until we eventually end up with 30.

10 So, anyway, that's the thought. The only
11 difference between the standard jury selection and this
12 one is that at the close of my questioning, I'd have you
13 come up and move for challenges for cause; not
14 peremptory challenges, just challenges for cause.

15 So, anyway, that's the thought. So tell me what
16 you think about that.

17 MR. DARROW: So the subject matters that you
18 would be covering with the jury would be the same sort
19 of generic stuff that you do with the regular jury?

20 THE COURT: Yes. "Have you read anything
21 about the case?" Clearly I will do that. I mean, there
22 was the article in Seven Days. If someone has read that
23 article, my guess is that they probably would be
24 challenged for cause. I wouldn't want to get into the
25 details of that article, but if somebody's read that

1 article, then there's a problem with that juror. Aside
2 from that, I don't think there has been any publicity, I
3 don't think. You tell me. Has there been any
4 publicity?

5 MR. KAPLAN: No. But that article was
6 significant, and I -- for the record, my -- our client
7 is quite upset about it, and I agree that I think the
8 U.S. Attorney's Office -- not these folks, but it was
9 very inappropriate for the comments that were made that
10 close to trial, and the nature of the comments, and he
11 wants me to put that on the record. I don't know if he
12 wants me to do that again in public, but we are
13 concerned about it.

14 THE COURT: Well -- and you are not going to
15 do that in front of the jury?

16 MR. KAPLAN: No, of course not.

17 MR. DARROW: For what it's worth, I don't know
18 a lot, but -- about it, but I think that she -- the
19 author worked on that article for a long time, and I
20 think that interview with Abby might have been, I don't
21 know, what -- well, I know it was months ago. And she
22 was the only one at the U.S. Attorney's Office that was
23 quoted. But I share your concern.

24 THE COURT: Okay. So, anyway, tell me about
25 what you think about this process.

1 MR. DARROW: It's fine with us. Counsel had
2 raised a question about -- the e-mail that came around
3 from Elizabeth had suggested an outline what you have
4 described and said that the parties would have an hour
5 and a half each. Counsel had raised a question whether
6 that would be enough, thinking that if we were in the
7 thick of things, you might give us a little more time.

8 THE COURT: Um hum. Well, I'd like to work it
9 out that going through this pool of 30, once we have
10 identified the 30, and then you have gone into your voir
11 dire, it seems to me that we should be ending after the
12 first day. And tell me if -- that's three hours. An
13 hour and a half times two is three hours. Or four
14 hours?

15 I mean, the fact is, I'm going to be going through
16 a lot of the challenges-for-cause questioning, so I
17 thought that you didn't need as much time necessarily,
18 but you are going to get more -- I don't feel
19 comfortable going into questions about facts in this
20 particular case because I don't think the judge
21 describing facts is a good thing generally because
22 jurors may think that I'm making an assessment of what
23 is likely to happen. So you certainly will be going
24 into the facts, and you will need plenty of time.

25 Well, what's the consensus here? Do you have a

1 consensus?

2 MR. KAPLAN: Maybe the thing to do, Judge, is
3 sort of play it by ear, and if you think at some point
4 we are just asking questions for the sake of asking them
5 or it's taking too long or repetitive, you can certainly
6 let us know that.

7 THE COURT: If you have got an hour and a half
8 and you have got an hour and a half, you can ask each
9 juror a whole lot of questions.

10 MR. KAPLAN: Sure. It's just a different
11 case, that's all, than we normally have.

12 MR. DARROW: We were thinking of talking about
13 some of the usual stuff, like -- I don't know, talk
14 about you are in federal court. Any of you have such
15 strong feelings about the federal government in these
16 polarized times that's a problem for you? There's
17 federal laws about guns and drugs, for example, that's
18 different from Vermont law, and any of you have a
19 problem with that?

20 But in this case I was thinking also of chatting a
21 little bit about the law that applies to the trafficking
22 stuff like saying this is -- there's a difference
23 between prostitution, on the one hand -- a prostitution
24 ring, on the one hand, and trafficking, the other, even
25 trafficking requires this additional element, and

1 talking about that a little bit.

2 THE COURT: Well, and then are you going to be
3 talking about the minor. So coercion is not required in
4 terms of the trafficking involving the minor?

5 MR. DARROW: Yes, that there's one -- there
6 are a number of trafficking counts. One of them is as
7 to a minor. It's not required as to that, but as to
8 these other counts, there's something about coercion and
9 let's talk about what that means.

10 MR. KAPLAN: What does that mean?

11 MR. DARROW: That's everybody's question. I
12 was hoping you would tell me.

13 THE COURT: I think that's really helpful.
14 And I think the more you talk about the nature of the
15 facts here, the more likely it is that you are going to
16 get some response from jurors who really cannot serve.
17 So I think -- I think that's fine.

18 You tell me whether you would object to that --

19 MR. KAPLAN: No.

20 THE COURT: -- discussion.

21 MR. KAPLAN: No.

22 THE COURT: And you are going to be talking
23 about the facts in detail as well to explore whether, in
24 fact, people are biased or prejudiced?

25 MR. KAPLAN: Sure. I think our questions may

1 be more general as opposed to specific facts about the
2 case, but we touch all the subjects that the case deals
3 with, you know.

4 The other issue, Judge, is if both Natasha and
5 myself want to do some of the questions, is that
6 possible? Like I would ask questions and then defer to
7 Natasha, she could come up and finish.

8 THE COURT: Yeah, I think that's fine.

9 And you can do that as well, split them up. But if
10 you are talking about a voir dire for an hour and a half
11 or two hours, that's a long time, and you might want to
12 change it around.

13 MR. DARROW: If I understand the difference
14 between when, during voir dire, counsel -- a lawyer can
15 veer into the unacceptable, it's when you start asking
16 so-called stakeout questions.

17 THE COURT: Yes.

18 MR. DARROW: So --

19 THE COURT: Right. If you are asking people
20 to commit themselves. If you heard this --

21 MR. DARROW: Would you vote that?

22 THE COURT: -- would you vote that?

23 MR. DARROW: Yeah.

24 THE COURT: Yeah. That's completely improper.

25 MR. DARROW: The question is could you keep an

1 open mind and weigh impartially the evidence if you
2 heard this -- actually we are not going to be asking
3 questions like that, but if this -- if the judge tells
4 you something like this is the law, is that a law you
5 could apply? Or would you find that, no, someone's a
6 drug-addicted prostitute, I wouldn't believe a word she
7 said?

8 THE COURT: Yes. Absolutely.

9 MR. DARROW: Okay.

10 THE COURT: You just can't get them to commit
11 to a vote.

12 MR. KAPLAN: But you can ask them how a
13 particular witness who said or done something would
14 affect their view of their credibility.

15 THE COURT: You can ask it in the general
16 sense, right.

17 MR. KAPLAN: Yes.

18 THE COURT: Yes. In fact, you are going to
19 have pretty free rein here. I am hoping that the most
20 obvious jurors who are going to be biased will be
21 removed quickly.

22 MR. KAPLAN: Right.

23 THE COURT: But it would be really helpful to
24 get through the first round by the end of the day so
25 then you are starting with, you know, a pretty good

1 sense of where you are going.

2 MR. DARROW: How do you mean the first round
3 by the end of the day?

4 THE COURT: Well, you start with 30 -- 30 who
5 will get through my questioning.

6 MR. DARROW: Okay.

7 THE COURT: And then you have got your voir
8 dire, and you have got your voir dire, and then we come
9 up, do challenges again and peremptory challenges at
10 that point, and a lot of people will be excused.

11 I assume that you will be back down to 12, so 18
12 people will be excused. They won't have to come back
13 the following day. So then you are talking about 18
14 being excused at that point and as well as whoever is
15 challenged for cause initially. So you might be able to
16 reduce the pool by 30.

17 MR. DARROW: So are you envisioning that after
18 we did a round, is what you have talked about, you have
19 been through them, you put in another 30, you have got
20 30 in there that have been through your voir dire, then
21 the parties do their voir dire, then we do some
22 peremptories, and you are saying that's a round, and
23 then if we need to do it again, we do it at all over
24 again the next day?

25 THE COURT: Correct. Clearly we will be doing

1 it all over again. And my guess is if you start with a
2 round of 30, some of those will be challenged for cause
3 based upon their answers to your questions. And then
4 assuming challenges for cause are through, and you still
5 got at least 12 jurors there, then you start using
6 peremptories.

7 MR. DARROW: Okay. So the only prospective
8 jurors in the courtroom during this is the 30 that you
9 brought in. There're not going to be any in the
10 gallery --

11 THE COURT: Oh, no, they will be in the
12 gallery and listening. Absolutely. You are telling
13 them to listen to all the questions because when they
14 are called --

15 MR. DARROW: You don't have to repeat them
16 all.

17 THE COURT: Right. My standard question is,
18 Are there any responses?

19 MR. DARROW: Okay.

20 THE COURT: One thing I am concerned about is
21 if you have these people in the back, and it becomes
22 obvious that all you have to do is say "I can't be fair
23 and impartial in this particular case," and then they
24 get excused, you know, that seems to be almost a
25 get-out-of-jail-free card. It doesn't take a brain

1 surgeon -- I always use brain surgery as an analogy at
2 this point.

3 MR. DARROW: As opposed to cardiac surgeon.
4 Sorry.

5 THE COURT: Yeah. I haved the cardiac and
6 brain surgery. I have just had all of the -- yeah.

7 Of course you can explore with a juror who says
8 that.

9 MR. KAPLAN: I mean, they might.

10 THE COURT: Oh, absolutely. And I will do
11 that --

12 MR. KAPLAN: Right.

13 THE COURT: -- for sure.

14 So is there any objection to this process?

15 MR. KAPLAN: No.

16 MR. DARROW: Not from us.

17 THE COURT: Okay? Okay.

18 MR. DARROW: Judge, will you do hardships too?

19 THE COURT: Are we going to do hardships? I
20 have been doing hardships forever.

21 MR. DARROW: No. I mean, the jurors that say
22 "I am going to my kid's graduation on April 26th" or
23 something.

24 THE COURT: They have had an opportunity to do
25 that with me first.

1 MR. DARROW: Okay, so we think we are past
2 that?

3 THE COURT: We are past that, although we got
4 six more today and there will be more coming, but -- 114
5 people are coming.

6 MR. DARROW: All right. Can we hope that
7 after we have been through round one, we will be able to
8 get from the clerk's office one of those charts with
9 names and whatnot?

10 THE COURT: Yes.

11 MR. DARROW: Good.

12 THE COURT: Yes.

13 All right. So the videos I have not looked at yet.
14 I plan to look at the videos today so that you get a
15 ruling on that fairly soon. And I thought it was sort
16 of left with the defense that if you wanted a hearing on
17 the Backpage or Facebook, you'd let us know, but you
18 didn't let us know.

19 MS. SEN: Well, your Honor, actually the
20 government has actually done the Backpage search for us.
21 We got the results of that last week.

22 THE COURT: Oh, really?

23 MS. SEN: Yes.

24 THE COURT: Oh, good.

25 MR. KAPLAN: Just happen to know the right

1 people.

2 MR. DARROW: Or say would they like a hearing.
3 Perhaps we should get counsel for the FBI.

4 THE COURT: I love it.

5 MS. SEN: I think that worked, your Honor.

6 THE COURT: Oh, you think you thought of the
7 counsel -- good. So that's resolved.

8 MS. SEN: That is resolved. And we already
9 talked about the Backpage space will not be called to
10 court.

11 MR. KAPLAN: Can I ask on the Facebook, you
12 received -- all the Facebook we have came from your
13 opinion. So we're just in agreement that those can be
14 introduced without a problem? Because we don't have a
15 problem with you introducing the -- any Facebook stuff
16 that you want to introduce, other than pictures maybe.

17 MR. GRADY: Well, I think it depends on --
18 obviously the ones that we intend to admit are -- some
19 of them are statements of the defendant, and obviously
20 the other party to it would put context to it, or there
21 will be conversations certainly between witnesses and
22 the defendant that we'll be introducing.

23 You will probably want to sample it -- if you have
24 specific ones that you are seeking to introduce, you
25 know, for the ones that you are seeking to introduce, it

1 wouldn't be party-opponent as to Folks because that's
2 his statement. So it just depends. I guess it just
3 depends on which ones exactly you are seeking to
4 introduce and which rule you are seeking to introduce.

5 MS. SEN: But you are not going to object to
6 the authenticity of the record?

7 MR. GRADY: Right.

8 MR. KAPLAN: We would show them to the
9 witness.

10 MR. GRADY: Sure.

11 MS. SEN: Yes.

12 THE COURT: It's only a question of relevance
13 at this point.

14 MR. KAPLAN: Right.

15 THE COURT: Okay. So you will be getting an
16 order on convictions and arrests, the relevance of
17 those, fairly soon.

18 Does either party intend to file any motions *in*
19 *limine* that have not been filed yet?

20 MR. KAPLAN: I don't think we did.

21 MS. SEN: Not at this time, your Honor.

22 THE COURT: Okay. And from the government?

23 MR. DARROW: (Shakes head.)

24 THE COURT: And I have heard rumor that the
25 government's pared down its list of witnesses. And I am

1 interested to know what the length of time you
2 anticipate taking to put on your case.

3 MR. DARROW: We have. We have pared down both
4 the exhibit list and the witness lists significantly and
5 forwarded copies to counsel last week. We went through
6 this process a while ago. What was it, two and a half
7 weeks?

8 MR. GRADY: No. I think we still estimate
9 that we will do Thursday and Friday of this week and
10 then Monday through Thursday of next week. I think we
11 will be probably close towards the end of next week.
12 And certainly I think we would finish up early the third
13 week, which would be that Monday or Tuesday, because our
14 final -- go ahead, your Honor.

15 THE COURT: That's to the 2nd or the --
16 actually the 2nd?

17 MR. GRADY: Right.

18 THE COURT: So you will go through the end of
19 this week; you will go through the next week.

20 MR. GRADY: Yes.

21 THE COURT: Takes you to the 2nd, and you may
22 have a carryover into the following week. But now the
23 defense is on notice that you really have to be calling
24 your witnesses on --

25 MR. GRADY: I think our final witness will be

1 very -- will be somewhat lengthy, and she's planning on
2 coming that Friday the 3rd, because she is in Maine,
3 upper Maine, right now, and I anticipate she will
4 probably go on the 6th, that Monday. And she would
5 probably be our final witness. But if we move quicker,
6 who knows? We will see what happens.

7 THE COURT: All right. Good. So when I talk
8 to the jurors, I usually say how long the trial is going
9 to be, and this is obviously probably distressing for a
10 lot of jurors to think they are looking at three weeks
11 or a month.

12 I'm not asking the defense whether you are going to
13 call witnesses or call the defendant, but it would be
14 nice to be able to say how long the trial we expect
15 would last. So you might want to talk with the
16 government and figure out, you know, reasonably the
17 trial's going to end approximately when. Any objection
18 to that?

19 MR. KAPLAN: No.

20 THE COURT: Okay. So probably, you know,
21 unless you are putting on a whole lot of witnesses, you
22 are starting on Monday of the third week, the case turns
23 over to you.

24 MR. KAPLAN: So we would be done within two or
25 three days of that at the most.

1 THE COURT: Oh, okay. So that is the 9th,
2 10th, 11th, 12th. Somewhere around the 12th.

3 MR. KAPLAN: The 11th I have to leave town for
4 the weekend, for graduation, but -- so I think that's a
5 Friday.

6 THE COURT: Is that Friday?

7 MR. GRADY: I think that's a Saturday. The
8 11th is Mother's Day?

9 MR. DARROW: We will give you Mother's Day
10 off.

11 MR. KAPLAN: I am leaving on the 10th then.

12 THE COURT: That's fine. Okay. So if the
13 jury begins to deliberate, then we will just continue
14 it.

15 It's a cousin or --

16 MR. KAPLAN: No. My son's -- my grandson's
17 graduating from Rice University.

18 THE COURT: Oh, that's great.

19 MR. DARROW: Geez, you have a grandson
20 graduating from college?

21 MR. KAPLAN: I was only 10 when he was born.

22 THE COURT: There's an unwritten rule in
23 Vermont that somebody's got anything to do with family,
24 the court comes second.

25 MR. GRADY: It's a nice rule to have.

1 THE COURT: Yes. So we got the witnesses
2 scheduled, no other motions *in limine*, you get an order
3 on convictions and arrests, and you will get an order on
4 videos fairly soon. The Backpage and Facebook issues
5 are withdrawn, and we are set on voir dire. Those are
6 the things that I really wanted to talk about.

7 So tell me if there's something the government
8 wants to talk about.

9 MS. SAVNER: Yes, your Honor. Just in terms
10 of the videos, we saw from your order that you thought
11 that the video concerning minor victim E was sort of off
12 the table because the government wasn't planning on
13 introducing it. Sorry if we gave you that impression,
14 but we didn't submit a copy of that one video to you,
15 but we have one for you now.

16 THE COURT: Great.

17 MR. DARROW: And, your Honor, if I could
18 supplement that: We are intending to introduce that
19 video. That's the -- what's been referred to as the
20 Hannah video, I don't know, variously, the weighty
21 treatment video. But that's an important part of the
22 government's case relating to coercion by serious harm
23 by reputational injury where he gets angry at a female
24 worker, Hannah, and creates this video, demeaning video,
25 about her and posts it on his Facebook page, and that's

1 that video. We certainly do want to introduce that.

2 THE COURT: Okay.

3 MR. DARROW: Thanks.

4 THE COURT: All right. Anything else from the
5 government?

6 Okay. Anything from you?

7 MR. KAPLAN: No, Judge. Thank you.

8 THE COURT: Okay. Well, it's been lovely.

9 (Chambers conference concluded at 10:25 a.m.)

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14 C E R T I F I C A T I O N

15 I certify that the foregoing is a correct
16 transcript from the record of proceedings in the
above-entitled matter.

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18 January 7, 2020
19 Date

Anne Nichols Pierce

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